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6 IN THE UNITED STATES BANKRUPTCY COURT
7 FOR THE DISTRICT OF ARIZONA
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9
10 In Re

11 GRACE P. THOMPSON,

12 Debtor.

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LAWRENCE J. WARFIELD,
Chapter 7 Trustee

14 Plaintiffs,

15 v.

16 GRACE P. THOMPSON

17
18

Defendant.
19

Chapter 7

Case No. 04-6263-SSC

Adv. No. 04-1166

MEMORANDUM
DECISION

20 **I. Introduction**

21 This matter comes before the Court on the Plaintiff's December 27, 2004 Motion
22 for Summary Judgment. The Defendant/Debtor, Grace P. Thompson, filed a response to the
23 Motion on January 28, 2005, entitled an "Answer". The Plaintiff subsequently filed a Reply on
24 February 4, 2005. On March 8, 2005, the Court held oral argument on the Motion. At the
25 conclusion of the hearing, the Court found in favor of the Plaintiff, granting the Motion for
26 Summary Judgment.

27 In this Memorandum Decision, the Court has now set forth its findings of fact and
28 conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues
addressed herein constitute a core proceeding over which this Court has jurisdiction. 28 U.S.C.

§§ 1334(b) and 157(b) (West 2005).

II. Factual Background

The relevant facts in this matter are undisputed. The Debtor filed her Chapter 7 petition on April 13, 2004. On May 19, 2004, the Trustee filed a Motion to Compel Turn Over of Estate Assets in Connection with certain non-exempt funds in the amount of \$4,200.00¹ (“Motion”) held by Debtor at the time of filing her petition. On June 15, 2004 Debtor filed a response to the Motion, which she entitled an “Answer.”² In her Answer, the Debtor claimed that the \$4,200.00 was exempt under Arizona’s homestead exemption statute.³ A hearing on the Motion was set for June 22, 2004. At the June 22 hearing, counsel for the Plaintiff, after a prior consultation with the Debtor, requested a continuance of the hearing. The Debtor did not attend this hearing. During the hearing, the Court advised the Plaintiff’s counsel that the Debtor might appear telephonically for future hearings. The hearing was continued to August 2, 2004 at 10:30 am.⁴ The Court separately sent a copy of the Minute Entry to the Debtor at her change of address as reflected on the Court Docket.⁵

On June 23, 2004, the counsel for the Trustee filed a separate Motion to Compel Turn Over of Estate Assets⁶ (“Tax Motion”) in connection with the Debtor’s 2002 and 2003 Federal and State income tax returns, requiring a turnover of any tax returns by September 1, 2004, and the turnover of any refunds by November 1, 2004. A hearing for the Tax Motion was set for August 2, 2004 at 10:30 am.⁷ The Debtor has yet to file a responsive pleading as to the

1. Dkt. #7.

2. Dkt. #11

3. According to the Debtor’s own pleadings, the sum of \$4,300.00 in question was used to purchase a trailer on or about April 30, 2004. The \$4,300.00 did not come from a previous homestead. Accordingly, the money used to purchase the trailer was not entitled to a homestead exemption under A.R.S. § 33-1101.

4. See Minute Entry from June 22, 2004 hearing. Dkt. #20

5. See Dkt. #20 and #8.

6. Dkt. #15.

7. Dkt. #16.

1 Tax Motion.

2 The Trustee sent notice of the hearing for the Tax Motion on June 24, 2004, and
3 sent a Notice of Continued Hearing for the other Motion on June 25, 2004. The Trustee filed
4 Certificates of Service for both Motions.⁸ Both Motions were, thus, scheduled for hearing on
5 August 2, 2004.

6 On July 27, 2004, the Trustee filed a Motion to Continue both hearings with the
7 Court.⁹ This Motion was prompted by the Trustee's decision to substitute a new counsel for him
8 in all of his bankruptcy matters. Recognizing that such an action on extremely short notice was
9 not appropriate, on July 28, 2004, the Trustee withdrew the Motion to Continue.¹⁰ On July 30,
10 2004, the Court independently viewed the Motion to Continue, when filed in this and so many
11 other cases, as inappropriate and denied the Trustee's Motion to Continue.¹¹

12 On August 2, 2004 a hearing was held on both Motions. The Debtor failed to
13 appear at the hearing, either telephonically or in person. It must be emphasized that given the
14 late filing of the Motion to Continue by the Trustee, and the prior notice of the hearing by the
15 Court and Trustee's counsel in June 2004, the Debtor could not have reasonably relied on the
16 July 27, 2004 Motion to Continue the August 2, 2004 hearings. In any event, the Motion to
17 Continue was not granted.

18 On August 2, 2004, the Court granted both Motions during the hearing.¹² As a
19 result, the Court issued an Order requiring the Debtor to turn over her 2002 and 2003 tax returns
20 by September 1, 2004, and required a turnover of any refunds that the Debtor received by
21 November 1, 2004.¹³ The Court issued a separate Order requiring the Debtor to turn over the

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23 8. Dkt. ##17, 19.

24 9. Dkt. #21.

25 10. Dkt. #25.

26 11. Dkt. #27.

27 12. See Minute Entry of August 2, 2004 Hearing. Dkt. #30.

28 13. Dkt. #32.

1 non-exempt funds that she held at the time of filing her bankruptcy petition in the amount of
2 \$4,200.00 by September 1, 2004.¹⁴ On August 11, 2004 Debtor was served with both orders.¹⁵
3 The Debtor did not not serve and file any motions or pleadings in response to the Orders. The
4 Debtor has still not complied with the Orders and has offered no reasonable explanation for her
5 conduct.

6 On November 11, 2004, the Plaintiff commenced a lawsuit against the Debtor,
7 objecting to her discharge under 11 U.S.C. §727(c)(1), (a)(6) for refusing to obey a lawful order
8 of the Court.

9 **III. DISCUSSION**

10 **A. THE STANDARD FOR SUMMARY JUDGEMENT**

11 A motion for summary judgment should be granted if the movant has shown that
12 there are no genuine issues of material fact and the movant is entitled to judgment as a matter of
13 law. Fed.R.Bankr.P. 7056(c). Ruling on a motion for summary judgment necessarily implicates
14 that substantive evidentiary standard of proof which would apply at trial. Anderson v. Liberty
15 Lobby, Inc., 477 U.S. 242 at 252, 106 S.Ct. 2505 at 2512, 91 L.Ed.2d 202 (1986). A material
16 fact is genuine if the evidence is such that a reasonable jury could return a verdict in favor of the
17 non-moving party. Id. Procedurally, "the proponent of a summary judgment motion bears a
18 heavy burden to show that there are no disputed facts warranting disposition of the case on the
19 law without trial." In re Aquaslide 'N' Dive Corp., 85 B.R. 545, 547 (9th Cir. BAP 1987). Once
20 that burden has been met, "the opponent must affirmatively show that a material issue of fact
21 remains in dispute." Frederick S. Wyle P.C. v. Texaco, Inc., 764
22 F.2d 604, 608 (9th Cir. 1985).

23 The opponent may not assert the existence of some alleged factual dispute
24 between the parties. Liberty Lobby, 477 U.S. 242 at 252, 106 S.Ct. 2505 at 2512, 91 L.Ed.2d
25 202 Instead, to demonstrate that a genuine factual issue exists, the objector must produce

27 **14.** Dkt. 31.

28 **15.** Dkt. #33.

1 affidavits which are based on personal knowledge, and the facts set forth therein must be
2 admissible in evidence. Aquaslide, at 547. In addition, summary judgment must be used with
3 care and restraint, Hutchinson v. United States, 677 F.2d 1322, 1325 (9th Cir. 1982), and is
4 reviewed in the light most favorable to the non-moving party. Hifai v. Shell Oil Co., 704 F.2d
5 1425, 1428 (9th Cir. 1983).

6 **B. Denial of Discharge for Failure to Obey Court Order**

7 Pursuant to §727(c)(1), the trustee may object to the granting of a discharge under
8 Subsection (a). Pursuant to §727(a)(6) a debtor is not entitled to a discharge, if the debtor has
9 refused to obey a lawful order of the court. Here, the Debtor has clearly refused to obey Court
10 Orders. Despite the Orders issued on August 10, 2004, the Debtor has failed to turn over the
11 assets or the tax returns to the Trustee as required by the Court.

12 The Debtor's sole defense for failing to turn over estate assets is that she was
13 denied her Constitutional right to be heard. This claim has no basis in fact or law. "An
14 elementary and fundamental requirement of due process ... is notice reasonably calculated, under
15 all the circumstances, to apprise interested parties of the pendency of the action and afford them
16 an opportunity to present their objections." Virtual Vision, Inc. v. Praegitzer Industries Inc., 124
17 F.3d 1140, 1144 (C.A.9 Wash. 1997) quoting Mullane v. Central Hanover Bank & Trust Co.,
18 339 U.S. 306, 314 (1950). The Debtor was given ample notice of all hearings. The Debtor
19 claims that the Trustee's Motion to Continue the August 2, 2004 hearing justified her not
20 attending the hearing. This is not supported by the facts. First, the Trustee withdrew his Motion
21 to Continue the day after filing it. Second, the Court denied the Motion three days after it was
22 filed. The Court has already provided, in the factual portion of this Decision, the information
23 that the Trustee was having difficulty as to how to proceed given his request to change his
24 counsel, and such procedures were causing the Court to intercede and deny the relief the Trustee
25 was requesting. Given the ample notice in June 2004 of the August 2, 2004 hearing to the
26 Debtor, and the fact that the Motion to Continue was quickly withdrawn and separately ruled on
27 by the Court, there was no reasonable basis for the Debtor to rely on such a Motion to Continue
28 as a basis for not showing up at a hearing. Moreover, the Debtor has made no claim, nor could

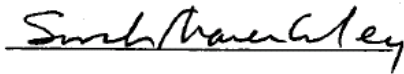
1 she, that she thought that the hearing was continued. Finally, the Debtor filed no response after
2 the Court issued the Orders, seeking to set them aside or to reconsider them. All of these facts
3 conclusively show that the Debtor was not denied her right to be heard.

4 Assuming, *arguendo*, that the Debtor was not afforded the right to be heard at the
5 August 2 hearing, this would not change the outcome of this matter. She was given the
6 opportunity to present her case, on the merits, at the March 8, 2005 hearing. There, she
7 reiterated her argument that the \$4,200.00 was exempt under the Arizona's homestead
8 exemption statute. Consistent with her filings with the Court, the Debtor stated that the
9 \$4,200.00 was spent post-petition and was not money received from the sale of a prior
10 homestead. According to her own statements in open court and her court filings, the Debtor is
11 not entitled to a homestead exemption. Additionally, the Debtor has given no reason for not
12 turning over her 2002 and 2003 tax returns or any refunds that she may have received. In short,
13 the Trustee has shown conclusively that he is entitled to the relief requested.¹⁶

14 15 IV. CONCLUSION

16 Based on the foregoing, the Court concludes that the Plaintiff's Motion for
17 Summary Judgment is GRANTED. The Court will execute a separate order incorporating this
18 Memorandum Decision.

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20 DATED this 2nd day of May, 2005.

21
22 
23 Honorable Sarah Sharer Curley
24 Chief U. S. Bankruptcy Judge

25 **BNC to NOTICE**
26

27 ¹⁶. The Court notes, that the Debtor was given ample opportunity to work out a payment agreement with
28 the Trustee. Both the Court and the Trustee made it clear that the Debtor could consider such an alternative.
Despite these statements, the Debtor determined that she did not want to pursue any settlement of the matter.